

July 26, 2004

From: Shirley Chalker, Vice President  
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**Subject: Overdraft Protection Guidance**  
**Docket No. OP-1198**

We appreciate the opportunity to provide comment on the proposed Interagency Guidance on Overdraft Protection Programs issued by the member agencies of the Federal Depository Institutions Examination Council. Our comments on the Proposal are set forth below and are identified by the title of the section of the Proposal to which they relate.

**I Request for Comment**

To state that discretionary overdraft services are “new” is not accurate in our opinion. Almost every financial institution in the country offers, and has offered, a discretionary overdraft service. All financial institutions are faced with checks not clearing an account because of an insufficient balance in the account. Likewise all financial institutions are faced with the decision to pay or return the insufficient item. Discretionary overdrafts have been around since checking accounts have been offered, and in our opinion a discretionary overdraft program has no connection to a line of credit. Almost every financial institution in the country offers and always has offered, a discretionary overdraft service.

The statement that describes coverage as being automatic for consumers who meet the institution’s criteria is not always true, as we still make the decision whether or not to show the account over. We look at each account daily that has insufficient items clearing, and mark the accounts to either pay over or return the item. This is something we have always done and is part of the discretionary overdraft program.

**II Concerns**

The proposal is characterizing overdraft protection services as “intended essentially as short-term credit facilities.” Discretionary overdraft services are not short-term credit. Granted institutions should be required to clearly disclose the nature of the overdraft protections services they offer. The Agencies and consumers have adequate remedies under the exiting laws to address any misleading or deceptive practices.

**III Safety & Soundness Considerations**

We do not believe that the 30-day time frame for charge off of an overdraft is an adequate time period for the consumer or the financial institution. Many consumers only get paid once per month. It has been our experience that 90% of the consumers will make

a deposit to cover their overdrawn balance within a 45 to 60-day time period. The overdraft protection feature is removed if they are overdrawn over 30 days, and they receive letters (in addition to the notices and statements that are sent out at the time the overdraft is created) notifying them the fact that the account is overdrawn. This proposal does not take into consideration well-managed discretionary programs and the bank's ability to adequately manage the program and the risks involved.

It has also been our experience that charging off an overdraft account reduces the chance of collection of the overdraft dramatically. Prematurely charging off an overdraft results in many in many cases in the truthful, but largely unnecessary, reporting of negative information to consumer reporting agencies.

We also disagree with reporting the available amount of overdraft protection as an "unused commitment". Commitment implies an agreement to assume a financial obligation at a future date. Discretionary programs do not involve written agreements, and are solely for the accommodation of the customer. The materials, disclosures, and procedures show that the payment of any overdraft is purely discretionary. Therefore no established commitment can be defined.

It has been our experience that the recovery rate for overdraft accounts is increased when the overdraft is converted to a closed-end, interest free, loan in which the consumer is given an opportunity to pay the overdraft in installments. Their account is left open without the overdraft protection for them to start over. The majority of these "fresh start" cases pay off their overdraft and handles their account very responsibly. They avoid additional costs and the negative impact on their credit rating and the depository institution dramatically increases the likelihood that they will recover on the overdrafts. For this offering to be effective though it needs to spread over several months. We do not agree that these repayment plans should require Regulation Z disclosures.

#### **IV Legal Risks**

It is our opinion that financial institutions are very responsible regarding the disclosure and education of any program offered, including the discretionary payment of an overdraft. The industry has for some time been very aware of the need for proper and full disclosure. Any isolated problems should be dealt with on an individual basis by the examining bodies and not as part of a global regulatory change that will further burden the community banks.

#### **V Best Practices**

We do not believe that a discretionary overdraft program encourages irresponsible behavior on the part of the consumer. Consumers have written checks in excess of their account balance for as long as banks have been in business. A discretionary program is a reward to the customer for their banking relationship and sound financial practices as the overdrafts are paid based on circumstances unique to that particular customer. **It is our belief that a well-managed program will take into account a consumer's financial**

**problems and will prevent most customers from becoming overdrawn beyond their ability to repay.**

Regarding marketing and communicating with customers, the proposal that suggests that depository institutions should also inform consumers generally of other available overdraft services or credit products and explain to consumers the cost and advantages of various alternatives, could lead consumers to assume that the service is automatically disadvantageous for all consumers. The advantage of one service to another is relative and completely dependent upon the consumer's own pattern of use.

Most account agreements provide that the deposit institution may, in its discretion and at its sole option pay or return a check or other item presented for payment against insufficient funds. The final Interagency Guidance should stress that, with a discretionary overdraft service the consumer should be advised that they may not rely on the fact that the depository institution will pay any item, even if it has done so in the past. It will detract from the discretionary nature of the program to have to outline all instances in which an account will be pay items. The emphasis should be on the discretionary nature of the service, not on disclosing the circumstances in which the discretion will be exercised.

### **Program Features and Operation**

Regarding the provision that depository institutions provide an opt-out service, in our program customers have the right to opt out. It is also explained to them that by opting out the items overdrawn the account will be returned and a fee will be imposed for the returned item. A form is completed that they do not wish to participate in the overdraft protection program.

The proposal to alert the customer before a non-check transaction triggers a fee, is not feasible especially with preauthorized automatic debits. Our proposal states that non-sufficient funds balance may result from the payment of checks, electronic funds transfer, or other withdrawal request, and also other situations such as the return of deposited items, the imposition of bank service charges, and the deposit of items which according to the Banks Funds Availability Policy are treated as not yet "available" or finally paid. Given the situation that prior notice is not always feasible in certain instances, the benefit to consumers in having those items paid rather than returned far outweighs the negative effects of eliminating such transactions from the coverage of an overdraft service.

The guidance also proposes that we should distinguish actual balances from overdraft protection funds availability, which will serve to confuse the customer. We have always given the customer their available balance, which is their ledger balance, less any check, debits, transfers, ATM/POS transactions, and plus any memo posted credits. We feel like they understand this and realize that all items clearing on a particular day in transit are not memo posted. (These would be the checks presented in grocery & retail store deposits.) If we display more than one balance customers will be confused.

Regarding the notification of consumers in advance if the institution plans to terminate or suspend the consumer's access to the service, in most cases this is done through correspondence to the customer by letters notifying them after 30 days of having an overdraft balance. Customers know when they are abusing the service, and if they have questions regarding their overdraft they call customer service. An account may qualify - under the system's parameters for a short period of time and then may re-qualify a short time later. The customers receive a notice when their account balance is insufficient, and likewise are notified which items are paid and which are returned. Having to pay or return an item within the 24 hour guidelines will not allow the banks to give prior notification of the suspension of their overdraft protection service.

Regarding daily limits and a cap on overdraft fees, retail stores are not given a daily limit or cap for charging a customer a fee for writing an insufficient check. Likewise, banks should not be governed in this manner. Each time an item is paid it avoids the possible imposition of the retailer (or payee), assessed extra fees, late charges and derogatory credit implications.

Overdraft protection program usage is monitored by officers, and excessive consumer usage is addressed. Efforts are made to help the customer reconcile their statements and get their account back into a positive figure. Only in the event that the service is abused are reports of negative information made to consumer reporting agencies.

Again, thank you for the opportunity to submit our comments on the Proposal to the Agencies.

Sincerely,  
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